BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRYAN S. SMITH	)	
Claimant	)	
VS.	)	Docket No. 193,477
RADKE IMPLEMENT	)	
Respondent	)	
AND	)	
JOHN DEERE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals from the November 16, 1994 Order of Administrative Law Judge George R. Robertson denying claimant benefits, finding claimant's injury did not arise out of it in the course of his employment with the respondent.

ISSUES

(1) Whether claimant's personal injury by an accident arose out of and in the course of his employment.

(2) Is claimant entitled to medical care and temporary total disability benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board finds claimant has failed to prove by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment while working for the respondent on the date alleged. Claimant, a thirteen-week employee of the respondent, alleges injury on June 24, 1994, while moving a transmission in the back of a pickup at the job site. Claimant alleges he felt a pop in his back which felt like a muscle pull.

Claimant was working with another employee by the name of Les. At the time of the alleged injury claimant made no mention to his coworker of any physical problems encountered on the job. The job site was approximately thirty-five (35) to forty-five (45) minutes away from the shop location. Claimant and Les rode in the same pickup from the job site. During this ride claimant engaged in conversation with Les, but at no time mentioned any physical problems associated with any injury suffered on the job. When

claimant arrived back at the shop he discussed his day with Tom, the shop foreman, but again failed to mention any problems associated with his job or any injury suffered on the job.

Claimant was originally scheduled to work the next day, Saturday, June 25, 1994, but had requested that he be allowed off work in order to attend his brother's wedding. After the wedding claimant attended a German dance at the VFW. Claimant alleges he drank only one to two beers at the dance and only danced slow dances, causing no injury to himself.

Claimant was scheduled to return to work on Sunday, June 26th and Monday June 27, 1994, but failed to appear either day. On Monday, June 27, 1994, claimant was examined by Dr. Ryan and advised Dr. Ryan that his pain came on acutely after dancing several hours on Saturday night. Claimant now denies this. Claimant also advised Dr. Ryan that this had been an intermittent problem throughout a number of years but had never been as severe as at this instance. Claimant originally denied pre-existing back problems during direct examination. On cross-examination, however, claimant admitted that he had suffered pulled muscles in the past but they had never lasted very long. Claimant also admitted a history of back problems in his family.

> "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 44-501(a).
>
> K.S.A. 44-508(g) defines burden of proof as follows:
>
> "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Claimant's burden must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Company, 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Whether an accidental injury arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case. Messenger v. Sage Drilling Company, 9 Kan. App. 2d 435, 680 P.2d 556, rev. denied 235 Kan. 1042 (1984).

The evidence in the record contradicts claimant's allegations of a work-related injury. Only claimant's unsupported statements support his contentions. The more compelling evidence appears to come from the fact claimant failed to mention this injury to either his coworker or his supervisor and the original comments made by claimant to Dr. Ryan when first examined. This information indicates claimant did not initially suffer a work-related injury, but rather suffered an injury suffered while dancing at his brother's wedding.

The Appeals Board finds that claimant's allegations of an accidental injury arising out or and in the course of his employment with respondent are not supported by a preponderance of the credible evidence and claimant's request for benefits must be denied.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge George R. Robertson, dated November 16, 1994, shall be and is affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph W. Jeter, Hays, KS
Donald L. Martin, Ellis, KS
Gary Winfrey, Wichita, KS
George R. Robertson, Administrative Law Judge
George Gomez, Director